

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

JAMES DICKERSON,	:	
	:	Case No. 09-1551
Plaintiff,	:	
	:	Philadelphia, PA
v.	:	August 3, 2009
	:	9:28 a.m.
DESIMONE, INC., et al.,	:	
	:	
Defendant.	:	

TRANSCRIPT OF ORAL ARGUMENT ON MOTION
BEFORE THE HONORABLE MARY A. McLAUGHLIN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiff:	MATTHEW B. WEISBERG, ESQUIRE Prochniak & Weisberg, P.C. 7 South Morton Avenue Morton, PA 19070
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For Defendants:	NICOLE GERSON, ESQUIRE 1420 Walnut Street Suite 300 Philadelphia, PA 19102
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1 THE CLERK: All rise, Court is now in session, the
2 Honorable Mary A. McLaughlin presiding.

3 THE COURT: Good morning, everyone.

4 MR. WEISBERG: Good morning, Your Honor.

5 MS. GERSON: Good morning, Your Honor.

6 THE COURT: Please be seated.

7 All right, we are here this morning in the case of
8 James Dickerson vs. Desimone, Inc. and other defendants. And
9 let me acknowledge everyone who's here. For the plaintiff,
10 this is Mr. Weisberg, is it, sir?

11 MR. WEISBERG: Yes, Your Honor.

12 THE COURT: Good morning. And is this Mr. Dickerson
13 who's with you?

14 MR. DICKERSON: Yes, ma'am.

15 THE COURT: Good morning to you, sir.

16 MR. DICKERSON: Good morning, ma'am.

17 THE COURT: And Ms. Nicole Gerson here for the
18 defendants. Good morning, ma'am.

19 MS. GERSON: Good morning, Your Honor.

20 THE COURT: All right. The purpose of this
21 morning's hearing is for the Court to consider and have oral
22 argument on the defendant's motion to dismiss. And in looking
23 over the complaint, Mr. Weisberg, I guess the first thing I
24 want to do is make sure that I have federal jurisdiction over
25 this, because there's no diversity, correct, Mr. Weisberg?

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1 MR. WEISBERG: Correct, Your Honor.

2 THE COURT: Okay. So as I understand it, your
3 federal jurisdiction is based on a claim under the Federal
4 Equal Credit Opportunity Act and 1983, is that correct?

5 MR. WEISBERG: Yes, Your Honor.

6 THE COURT: Okay. What is the Federal Equal Credit
7 Opportunity Act claim? I couldn't tell from your complaint.

8 MR. WEISBERG: That my -- that the dealership,
9 Desimone, was actually the lender, and that they rejected his
10 credit application and never sent him a rejection notice per
11 the Equal Credit Opportunity Act.

12 THE COURT: Okay. Is that in your complaint?

13 MR. WEISBERG: Yes, it is, Your Honor.

14 THE COURT: Okay, all right. So is there a
15 particular part of the statute you want to cite me?

16 MR. WEISBERG: In my complaint, in paragraph 50, I
17 cited 15 U.S.C. Section Civil 1694(e).

18 THE COURT: Okay. 1994(c)?

19 MR. WEISBERG: 1694(e).

20 THE COURT: Oh, that's an E, okay. And so that's
21 the part of the statute that you believe was violated?

22 MR. WEISBERG: I put et seq, so off the top of my
23 head, this wasn't an issue -- my memory is -- I don't think
24 this was an issue in the motion to dismiss, so --

25 THE COURT: Well, I guess it's what you wanted a

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1 more definite statement on, Ms. Gerson?

2 MS. GERSON: I believe so.

3 MR. WEISBERG: Oh actually, I'm sorry. It's 15
4 U.S.C. Section Civil 1691(d).

5 THE COURT: 1691(d) as in David?

6 MR. WEISBERG: Yes.

7 THE COURT: Okay.

8 MR. WEISBERG: Which is --

9 THE COURT: And again, tell me what it was that you
10 believe, Desimone is a lender?

11 MR. WEISBERG: Yes.

12 THE COURT: And rejected Mr. Dickerson's request for
13 credit without doing what again?

14 MR. WEISBERG: Without sending him an -- what's
15 called an adverse action notice under ECOA.

16 THE COURT: Okay.

17 MR. WEISBERG: And it actually -- another statute is
18 12 CFR, Section symbol, 202.9(a)(2, and that's in my
19 paragraph, in my response to motion to dismiss.

20 THE COURT: Okay. You need to put -- you need to
21 have a complaint though, Mr. Weisberg, that very specifically
22 mentions, you know, what part of the statute, especially when
23 I don't have federal jurisdiction otherwise, you know.

24 Now 1983, what is the state -- the state actor here?
25 Why are these defendants state actors?

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1 MR. WEISBERG: This Court, the Third Circuit in
2 Jordan -- this is not an issue for the motion to dismiss, but
3 this is just to answer the Court's question.

4 THE COURT: Yes, but I have to be sure I have
5 jurisdiction.

6 MR. WEISBERG: Fair enough.

7 THE COURT: And I'm not sure --

8 MR. WEISBERG: Fair enough.

9 THE COURT: -- of it at this point.

10 MR. WEISBERG: In the Third Circuit's case of
11 Jordan, and more recently than Jordan, Grillo by the Eastern
12 District, and I believe some cases after that, a private
13 individual can become a state actor if they clothe themselves
14 with the authority of the state.

15 THE COURT: No, I understand that. That's basic
16 law.

17 MR. WEISBERG: Right.

18 THE COURT: What I'm asking is what -- how did they
19 become a state actor in this case?

20 MR. WEISBERG: By enlisting the police in the name
21 to arrest my client. They in essence arrested my client.

22 THE COURT: So anyone who files a complaint with the
23 police is a state actor?

24 MR. WEISBERG: Not anyone. I believe the Jordan
25 case talks about the use of the government, and more -- and my

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1 memory is in the Jordan case it was a confession of judgment,
2 for example, and the Third Circuit held that the confession of
3 judgment itself was not enough. But after that, there was a
4 execution or a levy on that judgment.

5 And so in this case, it wouldn't be someone who just
6 reports to the police a crime, even if they were involved in a
7 crime. It would be the more, which is that there was actually
8 Desimone's agent testifying in Court that -- which is similar
9 I think to the Grillo affidavit, but I'm -- again, off the top
10 of my head -- that my client's -- my client was a criminal,
11 when the Court ultimately held, as in the Prosecutor's Office,
12 that that was not the case, as a matter of law.

13 THE COURT: Mmmhmm. Okay. Well, it's tricky. I'm
14 not sure we have state action here just based on the fact that
15 they file a complaint with the police. I mean there may be
16 other -- obviously there may be abuse of process, there may be
17 malicious prosecution --

18 MR. WEISBERG: I understand.

19 THE COURT: -- I'm not suggesting -- I don't know
20 where I am on that. But I am concerned that I'm not sure that
21 this is a Federal Court case based on that. But I will, of
22 course, consider it.

23 But going to a broader question. What is it that
24 you want from the complaint? Is Mr. Dickerson -- I understand
25 about his arrest. But putting the arrest aside for the

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1 moment, is Mr. Dickerson out any money or anything? What is
2 it that you want from this complaint, Mr. Weisberg?

3 MR. WEISBERG: Well, our primary request under the
4 state law claims, as I think I cited, he's entitled to non-
5 economic damages. Being imprisoned --

6 THE COURT: But I'm talking aside from that --

7 MR. WEISBERG: So only --

8 THE COURT: Yes. I'm just focusing on the
9 transaction with the car.

10 MR. WEISBERG: One second, if you could, I have my
11 client here.

12 THE COURT: Mmhmm.

13 (Pause)

14 MR. WEISBERG: My client -- again, thank you, Your
15 Honor, for that question. It's unexpected so I had to refer
16 to my client.

17 But my client contends that because of the loss of
18 the use of the truck, he's a handyman, and he couldn't do his
19 job and he lost money that he otherwise would have made.

20 And second of all, he lost the truck.

21 THE COURT: Okay. Well, when you say he lost the
22 truck, talk to me about what happened. He -- did Desimone --
23 I still don't understand what happened with Desimone. Did
24 Desimone call him or did he go to Desimone to buy a truck,
25 what happened?

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1 MR. DICKERSON: They called --

2 THE COURT: No, no, no, sir. No, no, no, you
3 shouldn't speak, because you have a lawyer.

4 MR. WEISBERG: I'll ask you if I have any questions.

5 THE COURT: Mr. Weisberg.

6 MR. WEISBERG: Yes, thank you, Judge.

7 In any event, yes, Desimone had contacted him --

8 THE COURT: Out of the blue or --

9 MR. WEISBERG: Yes, out of the blue.

10 THE COURT: Okay.

11 MR. WEISBERG: Claiming, and I'm referring to my
12 complaint, on January 12th they contacted him saying he was
13 preapproved for a vehicle of his choice.

14 THE COURT: Okay, and he didn't have -- he never
15 heard of Desimone before that. He didn't know anything about
16 them.

17 MR. WEISBERG: I don't know if he had never heard of
18 them. They're a somewhat well known dealership.

19 THE COURT: Okay. But I mean he had not had any
20 contact with them at all?

21 MR. WEISBERG: Right.

22 THE COURT: Okay. It came out of the blue. Okay.

23 MR. WEISBERG: And they advised him that in fact the
24 loan was already secured on his behalf with no money down,
25 that he had to bring proof of income and utility bills --

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1 THE COURT: I can read that, Mr. --

2 MR. WEISBERG: Okay.

3 THE COURT: I can read that, Mr. Weisberg, and have
4 read it. I just wanted to see if you could just tell me sort
5 of what's going on here. You know, what --

6 MR. WEISBERG: Well, the --

7 THE COURT: -- what really does -- why did you file
8 a lawsuit, other than the arrest? I mean, is there something
9 about this transaction?

10 MR. WEISBERG: Yes, the transaction is at the least,
11 an unfair trade practice. It's called -- in the industry it's
12 called a spot delivery.

13 THE COURT: Okay.

14 MR. WEISBERG: In the law, it's been called a yo-yo
15 transaction which means that the dealership sells you a car
16 under -- this is very prototypical conditions. They sell you
17 a car and you leave the dealership with a vehicle, and then
18 they call it back. So they yo-yo the vehicle back. And they
19 say well, we weren't able to secure you a loan. When in fact
20 it is the dealership itself that had already made the loan to
21 you.

22 And what the dealership means to say -- well, they
23 don't mean to say, they mean to hide it, they're saying it, is
24 that we couldn't sell our loan for a profit.

25 And the reason that my client discovered that they

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1 couldn't sell the loan for the profit is because he in fact
2 did receive ECOA notices from lenders that they tried to sell
3 it to.

4 THE COURT: Mmhhh.

5 MR. WEISBERG: And those lenders said essentially
6 that they had overcharged him for the vehicle, so the -- any
7 assignee of the loan wouldn't be wholly secured. And that
8 transaction, we would characterize among others, to be an
9 unfair trade practice, separate and apart the fact that they
10 went overboard, when he in fact complied with their demands to
11 return the vehicle.

12 THE COURT: Okay. All right. So, in essence, I
13 mean -- I assume he's glad he didn't do the transaction
14 because he would have been overcharged for the car, or the
15 truck, as far as he's concerned.

16 MR. WEISBERG: Well, I don't think -- respectfully,
17 Your Honor, I don't think my client would agree with that. I
18 think my client would say that he agreed to the terms. If he
19 was the worse off for the bargain, he made an agreement for
20 the bargain. And he's an honest man, and if he got taken in
21 terms of he had to overpay for a pound of roast beef, he had
22 to overpay. He wanted the truck.

23 THE COURT: But what does he want now? He wants
24 economic damages for the loss of the time because he didn't
25 have the car, the truck I mean?

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1 MR. WEISBERG: Yes.

2 THE COURT: Is there anything else? Is there
3 statutory damages?

4 MR. WEISBERG: Yes.

5 THE COURT: Is there anything else? Well, that's
6 what I'm asking you.

7 MR. WEISBERG: All right.

8 THE COURT: What is it that you want here by this
9 lawsuit?

10 MR. WEISBERG: Well, my memory again, this isn't in
11 the motion to dismiss, but that the ECOA Act as well as the
12 Unfair Trade Practice Act also enables a statutory penalty.

13 THE COURT: Mmhmm.

14 MR. WEISBERG: And in terms of the yo-yo
15 transaction, that's our predominant claims.

16 THE COURT: Right. Okay. All right. All right,
17 Ms. Gerson, did you bring the full arbitration agreement, or
18 the full document that it's part of?

19 MS. GERSON: I did.

20 THE COURT: That's great, ma'am. Why don't you hand
21 that up.

22 MS. GERSON: And it was attached to the motion to
23 dismiss.

24 THE COURT: Oh, I'm sorry. Oh, the whole thing was?

25 MS. GERSON: It's only one page.

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1 THE COURT: Oh, it is only one page. Oh, I thought
2 there was an argument in the motion to dismiss that was more
3 than one page. Okay.

4 (Pause)

5 THE COURT: Okay. Now, Ms. Gerson, even assuming
6 this arbitration agreement applies, would it apply to the
7 abuse of process claims?

8 MS. GERSON: Well, I believe the arbitration
9 agreement states that it's from anything that stems from the
10 contract itself, and everything does come from that.

11 I understand what your point is, but --

12 THE COURT: I mean, it says, let me just read the
13 language and then we can all be on the same page.

14 MS. GERSON: Sure.

15 THE COURT: "It is agreed that any controversy
16 arising in connection with this contract may be submitted to
17 binding arbitration."

18 I don't know. "Controversy arising in connection
19 with this contract." I mean, if when Mr. Dickerson returned
20 the car and it didn't have, whatever, the rims or whatever on
21 it, and so the people at Desimone got angry and hit him, you
22 know, there was a simple assault or something, that tort
23 wouldn't be covered by this, that tort?

24 MS. GERSON: Well, I think that gets into a criminal
25 area. So I think that that's why that might not. But --

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1 THE COURT: Well, no, but it would be a civil tort,
2 you can sue someone for assault. So I guess all I'm -- I'm
3 trying to test the limits of this, you know, because this is a
4 tort. And sometimes torts are included in arbitration
5 agreements. Just this -- this at least on its face, arguably
6 at least, and I haven't decided it yet but, seems far afield
7 from that.

8 MS. GERSON: Let me be perfectly honest about this.

9 THE COURT: Yes.

10 MS. GERSON: I honestly can't tell you for sure
11 whether it should or should not. I think it should because it
12 is still arising from the whole contract. Because if not for
13 the contract, none of the other stuff would have happened.

14 However, my bigger concern is that the case not be
15 split apart, because there will be a counterclaim in the case,
16 and I just want to make sure that everything is heard at one
17 time, regardless of whether it's here, arbitration, State
18 Court, that's the bigger concern for me.

19 THE COURT: Okay. So if I don't find that
20 everything's covered by arbitration, then you'd preferred that
21 I just keep the whole thing?

22 MS. GERSON: Exactly. I just think it's easier for
23 the case as a whole, because I'd hate to start separating it
24 out and doing it piecemeal. It just really makes a mess of
25 it.

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1 THE COURT: Yes. Now let me ask you. You asked for
2 more specific, or more definite statements I guess, with
3 respect to some of the claims. But you haven't actually
4 argued no federal jurisdiction. What is your view on the --
5 because you want to be in Federal Court, Ms. Gerson, is that
6 what your smile means?

7 MS. GERSON: I would prefer Federal Court over State
8 Court.

9 THE COURT: Mmhmm, okay.

10 MS. GERSON: I mean, that was the main reason that I
11 didn't do that.

12 THE COURT: Yes, yes.

13 MS. GERSON: I know it's not the answer you want,
14 but.

15 THE COURT: No, no, it's not a question of want. I
16 just want to be sure I understand, you know, everybody's
17 position.

18 Well, okay, ma'am, I didn't mean to direct too much
19 everybody's arguments. It's just that I did have certain
20 questions.

21 So, talk to me about -- I understand your position
22 on the arbitration agreement, and I'll go back to Mr. Weisberg
23 in a minute on why it shouldn't apply, and if it does apply,
24 whether or not everything's covered by it. But what are your
25 other points that you made in the motion to dismiss that you'd

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1 like to make here?

2 And you can then respond, Mr. Weisberg, of course on
3 the arbitration clause when I get through questioning.

4 MS. GERSON: Well, if I could first just respond to
5 what Mr. Weisberg said. Desimone, I do not believe is a
6 lender. They are a car dealership, they sell cars, they have
7 other people finance them. They don't do financing
8 themselves. Some dealerships have what's called "buy here pay
9 here" where they will finance the cars. Desimone does not do
10 that. Except in very, very, very, very rare occasions, maybe
11 once every three years they do that. It's just --

12 THE COURT: But what is the story -- what does it
13 mean, at least according to Mr. Weisberg, that Desimone
14 themselves were going to loan the money, but then they sent it
15 off and couldn't --

16 MS. GERSON: No. That's what I'm saying, I disagree
17 with that.

18 THE COURT: Okay.

19 MS. GERSON: They never had any intention of loaning
20 money. They don't do that. They are not in the business of
21 lenders. What they do is they arrange for financing. They do
22 credit applications. There are signed credit applications, a
23 signed application I believe in the package I gave you, that
24 it was not meant for Desimone. Desimone forwards it to
25 different banks to try and get their approval to lend the

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1 money. When they can't get that, they have to basically end
2 the deal. And they have an agreement for that too, which is
3 also in the papers that I gave you, a conditional delivery of
4 pre-financing addendum, which essentially says that your
5 financing has not yet been approved and if it's not approved,
6 you're going to have to bring the car back. So people are
7 aware of it. It's signed. It's something that buyers are
8 aware of when they do it.

9 THE COURT: Mmhmm.

10 MS. GERSON: Because you can't always get the
11 financing on the spot.

12 THE COURT: Right, okay.

13 MS. GERSON: As far as -- I can go through
14 everything in my motion, if you want --

15 THE COURT: No, that's okay. Just anything in
16 particular that you wanted to stress.

17 MS. GERSON: Other than the arbitration agreement, I
18 just thought that -- maybe I'm crazy, but I think that a
19 complaint should have more than one paragraph under a count,
20 other than saying you violated this whole statute. I want to
21 know exactly what they did to violate and what statute
22 specifically was violated.

23 THE COURT: Mmhmm. Ma'am, what's your counterclaim
24 about that you want to bring?

25 MS. GERSON: The counterclaim will be essentially

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1 theft or conversion for a change in the car, not returning the
2 wheels.

3 THE COURT: So what happened from your perspective?
4 The rims? What didn't come back, the rims or the tires?

5 MS. GERSON: I believe it's like the spinning rims
6 which you sometimes see on the cars, the fancy rims. They
7 were on the car when he took the car, or the truck, and when
8 he returned it they were returned with cheaper rims, regular
9 plain rims. And they called him back and they said you know,
10 we need the rims back, and he basically refused to bring them
11 back, and they wanted them and they called the police about
12 it. And the police investigated. I honestly cannot tell you
13 yet what happened at Court and why the case was nolo -- I
14 really don't know the answer to that yet.

15 THE COURT: Okay.

16 MS. GERSON: Obviously the other things were that
17 the unfair trade practices doesn't really say what that is
18 either, and so I didn't think that really counted.

19 Fraud, if the fraud is about the police complaint,
20 that's not what fraud is. There's no detrimental reliance,
21 there's nothing in there, so I don't think that fraud is a
22 valid claim.

23 I don't think that the abuse of process of malicious
24 prosecution are valid claims, because again, they were used
25 for exactly the purpose that they're intended. There was

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1 nothing -- it wasn't that they were trying to file a claim
2 that had nothing to do with anything that really happened. So
3 I don't think the abuse of process and malicious prosecution
4 are valid in this case.

5 The malicious prosecution, there was certainly
6 probable cause here to go to the police, at the very least.
7 And there was certainly no malice intended.

8 And as far as abuse of process, again, they used the
9 legal process to accomplish a purpose which the process was
10 designed. So I don't think that -- and that's just based on
11 what was written in the complaint as well.

12 I think that -- obviously I always get into the
13 attorney's fees and costs and punitive treble damages, but I
14 think that that's all covered in the motion.

15 THE COURT: Okay, thank you, Ms. Gerson.

16 Mr. Weisberg, what is the fraud, what do you mean
17 the fraud to be in this case?

18 MR. WEISBERG: The fraud is the representation that
19 my client was sold a car, when in fact he was not.

20 THE COURT: Okay.

21 MR. WEISBERG: And that my client was --

22 THE COURT: So it's nothing about the arrest?

23 MR. WEISBERG: Nothing about the arrest.

24 THE COURT: Okay.

25 MR. WEISBERG: That it was -- and that he was

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1 financed for a car when in fact it appears he was not. Or at
2 least Desimone contends there was not.

3 THE COURT: Okay, okay. And talk to me about the
4 arbitration agreement, please. Why shouldn't I enforce that
5 on -- with respect to all the claims? And if not as to all,
6 at least as to some?

7 MR. WEISBERG: Well, number one, the arbitration
8 agreement itself, we contend is vague and over-broad. It is
9 agreed that any controversy arising in connection with this
10 contract.

11 The arbitration agreements that I have litigated,
12 maybe even before this Court, refer to something. It may not
13 be all inclusive or exhaustive, but there's something. For
14 example, in employment contracts, there would be arising out
15 of a claim of discrimination and wrongful termination, or
16 something, or salary, or something of that nature.

17 THE COURT: This is not -- this is pretty standard
18 kind of language for an arbitration, I mean, you know, an
19 arbitration agreement. Sometimes they make even more specific
20 that they cover certain torts, but the language itself is not
21 unusual. What I'm not -- well, is there any reason other than
22 the language why this agreement isn't valid? In other words,
23 I understand I have to interpret it, and I don't -- I'm not
24 convinced at this point that it would cover, say the malicious
25 prosecution, the torts, but I'm not sure yet.

1 But putting that aside, is there any reason not to
2 enforce this?

3 MR. WEISBERG: Well, there are three reasons, Your
4 Honor.

5 First, the provision that each party has to bear
6 their own costs for the arbitration and attorney's fees for
7 the arbitration. Arbitrations are incredibly expensive, and
8 that is why this, the Third Circuit I believe has held, at
9 least in a class action recently that I don't remember, that
10 when there's a claim for a modest or respectfully to Mr.
11 Dickerson, a smaller claim to subject it to arbitration makes
12 it a cost prohibitive claim. And that's not the purpose of
13 the law.

14 THE COURT: You mean because he can't get his
15 attorney's fees back? Whereas he could in Federal Court?

16 MR. WEISBERG: Well, no, he might be able to, but
17 certainly the cost. When you go to arbitration, you have to
18 pay, as I'm sure Your Honor knows, you have to pay, you have
19 to pay whoever it is, a retired judge, a retired magistrate, a
20 lawyer, you have to pay them hourly. And it can be very,
21 very, very expensive, five to fifteen thousand dollars I would
22 suspect for this kind of claim. Especially now that there's
23 going to be a counterclaim.

24 We're talking about a case that has non-economic
25 damages as it's main point, and essentially lost wages of a

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1 finite period of time and statutory penalties. The cost of the
2 arbitration will overwhelm.

3 THE COURT: What lost wages?

4 MR. WEISBERG: Well, Mr. Dickerson contends that
5 because they took his car back, and he does content it was his
6 car, his truck, that he was not able to do his job as a
7 handyman.

8 THE COURT: The truck that they had sold him, you
9 mean?

10 MR. WEISBERG: Yes.

11 THE COURT: Okay. Not something else.

12 MR. WEISBERG: Right.

13 THE COURT: Okay. Over what period of time?

14 MR. WEISBERG: I think it was a brief period of
15 time. Mr. Dickerson?

16 MR. DICKERSON: It was probably the 12th to the
17 25th, I believe.

18 MR. WEISBERG: About two weeks, Your Honor.

19 THE COURT: Okay, all right. All right.

20 MR. WEISBERG: And the second reason, Your Honor --
21 well, if I can go back a little, just to show you how cost
22 prohibitive it is. Even this paragraph which sets forth what
23 I already know, that we have to pay for the arbitrator's
24 photocopying. I mean, it just shows you that these
25 arbitration forums, while I understand the Supreme Court and I

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1 understand that there are a lot of contentions that they're
2 for everybody, this Circuit has said they're not for the
3 smallest of claims.

4 And this is indicative of -- even if it were to be,
5 for example, if Your Honor were to dismiss this whole thing to
6 arbitration, and the defense were to bring a counterclaim for
7 let's say the stolen rims, I don't know how much stolen rims
8 are, but let's say they're 500 bucks. That would be cost
9 prohibitive to the defendants as well.

10 THE COURT: Well, they're asking me, so don't worry
11 about --

12 MR. WEISBERG: Okay, I'm just saying --

13 THE COURT: Don't worry about Ms. Gerson.

14 MR. WEISBERG: Okay, fair enough.

15 Second of all, we agree with Your Honor's question
16 that arising from the contract is not an arrest, a
17 prosecution, false testimony. That even if everything else is
18 subsumed in the arising from the contract, I don't see how
19 reasonably that could have been envisioned when this
20 arbitration agreement was signed by my client.

21 Third, there are federal claims. The motion itself
22 doesn't cite or discuss the standard for arbitration, it
23 doesn't discuss the interplay between the Pennsylvania
24 Arbitration Act and the Federal Arbitration Act, and it's my
25 belief that the -- I don't know that the Pennsylvania

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1 Arbitration -- I don't know, Your Honor, but I don't know that
2 the Pennsylvania Arbitration Act can control federal claims.
3 And I don't know because it hasn't been argued.

4 And so I would say that even if were to arise from
5 let's say breach of contract type of claims, I don't know that
6 it covers ECOA, the failure to give statutory notice. Is that
7 even arising from the contract, that there's a separate
8 federal law that requires a lender to give a notice of adverse
9 action? I don't think that arises from the contract. But I
10 don't know. That's why we're arguing that there is some
11 ambiguity there.

12 And that's the sum of our argument in terms of the
13 arbitration agreement.

14 Aside from what we also raised in our motion, that
15 my client -- this is a contract of adhesion, there was no
16 separate consideration for it. And in fact, the underlying
17 contract was nullified. So how could a arbitration agreement
18 that the defendant contends was part of the contract survive
19 the nullification of the contract, which they nullified.

20 THE COURT: All right. I'm sorry, go ahead, sir.

21 MR. WEISBERG: No, that's all right, I was just
22 hoping to segue into the contention about the more definite
23 statement.

24 THE COURT: Yes.

25 MR. WEISBERG: Okay. I think it's important when

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1 you take a look at the plaintiff's complaint to look at the
2 operative facts, the statement of the claims, which is
3 paragraphs 10 through 42.

4 THE COURT: Yes, but you see, when you bring a big
5 statute as your claim, you do need to tell the Court and the
6 other party which provisions you think -- in other words,
7 someone shouldn't have to go through a big long federal
8 statute to say well, gee, do I think he means this part or
9 that part. So you do have to tell us which provision of the
10 statute you think is violated.

11 MR. WEISBERG: Fair enough. And I did put that
12 provision in my response. I understand that the Court --

13 THE COURT: Well, I'll probably order you to do a
14 more definite statement --

15 MR. WEISBERG: Fair enough.

16 THE COURT: At a minimum. I mean, I may even
17 dismiss it all, I don't know yet. All I'm saying is that I do
18 think that we have to know, Ms. Gerson is entitled to know
19 what provisions of the statute that you believe were violated
20 by what.

21 MR. WEISBERG: Right.

22 THE COURT: So you do need to be a little more
23 specific I think on that.

24 MR. WEISBERG: In terms of that ECOA count --

25 THE COURT: Yes.

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1 MR. WEISBERG: -- it specifically does state,
2 "failing to report to plaintiff the adverse action of its
3 making and then rescinding the loan".

4 THE COURT: Okay.

5 MR. WEISBERG: To the extent that I just cited et
6 seq, I don't disagree but I think --

7 THE COURT: No, I understand. You can --

8 MR. WEISBERG: But in terms of the other allegations
9 for more definite statement, I don't see how defense can say
10 oh, I don't know what the abuse of process is.

11 THE COURT: Well, no, I think she's talking about
12 the statute. I mean, well, she may also want to know about
13 the abuse of process, but I thought it was -- are there other
14 statutes that are not set forth what provisions have been
15 violated? I know for the UTPCL --

16 MR. WEISBERG: Yes.

17 THE COURT: -- you do have a variety here.

18 MR. WEISBERG: Yes.

19 THE COURT: All right, anything further, Mr.
20 Weisberg, before I go back to Ms. Gerson?

21 MR. WEISBERG: I'm just trying to think what I may
22 have missed. If I can have a second, Your Honor?

23 THE COURT: Of course.

24 (Pause)

25 MR. WEISBERG: Oh, I wanted to touch upon -- and I

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1 think we're now getting into fact disputes.

2 THE COURT: Mmhmm.

3 MR. WEISBERG: About the conditional sales
4 agreement, that every buyer of this type of vehicle, in this
5 transaction knows that it's conditional.

6 Well, number one, we contend in our motion that it's
7 inadmissible.

8 But second of all, the Motor Vehicle Sales Finance
9 Act in Pennsylvania requires that all terms of a contract to
10 be in one document, to be in one document. And has held
11 specifically, these types of conditional delivery and pre-
12 financing addendums to be, an addendum to be not a contract,
13 because it's law violative.

14 But, Your Honor, I hesitate to bring it up because
15 we don't think this is the appropriate stage to be talking
16 about that. But it was brought up so I feel the need to
17 respond.

18 And the second feeling I need to respond, is that
19 I'm looking at the entire packet that Ms. Gerson kindly handed
20 to me, the retail installment sale contract. I see no lender
21 on this but Desimone. To the extent that -- and in fact, on
22 every single document it's Desimone.

23 When I bought my car, for example, Your Honor, my
24 retail installment sale contract was prepared by a dealership
25 and said Chase on it. This doesn't say that.

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1 And in any event, to the extent that the defense
2 argues differently, it's the stage they're at that the
3 complaint must rule.

4 THE COURT: Okay. Well, Ms. Gerson brought all
5 these documents to me because I had asked to have the whole
6 package because in opposition you said, well, she's only
7 showing you one part of it. I thought that was what your
8 argument was.

9 MR. WEISBERG: That is my argument.

10 THE COURT: Well, if you're making the argument, I
11 have to --

12 MR. WEISBERG: No, no, no --

13 THE COURT: I didn't quite finish yet.

14 MR. WEISBERG: Sorry.

15 THE COURT: So then I do think I need -- if you want
16 me to look at the whole thing, I need to have the whole thing
17 to look at. If you don't want me to look at the whole thing
18 and you just want me to look at the arbitration agreement,
19 that's fine. But I think that's why Ms. Gerson was giving me
20 everything.

21 Is it not, Ms. Gerson? Did I not ask you to bring
22 this?

23 MS. GERSON: It was at your request.

24 THE COURT: Okay, all right. So I just did that
25 because you had said that's not the whole agreement. So I

1 thought we should find the whole agreement.

2 Okay, Ms. Gerson, did you have any response, ma'am,
3 to any of Mr. Weisberg's arguments?

4 MS. GERSON: Yes, please. And I promise I'll be
5 brief.

6 As far as the fraud is concerned, in paragraph 51,
7 it does state that "it's knowingly and maliciously cost (sic)
8 the accusing plaintiff of a crime and relatedness use of the
9 Philadelphia Police Department and Court system and plaintiff
10 had in fact committed no criminal offense".

11 So it is about the subsequent police report.

12 And as far as fraud is concerned, fraud has to be
13 pled with specificity. You can't just say they had not
14 secured financing on plaintiff's behalf when they hadn't. It
15 has to be so and so said this, so and so said this, this
16 wasn't true.

17 As far as the arbitration provision is concerned,
18 the argument that each party has to bear their own cost is not
19 the basis for why the arbitration agreement should not be
20 valid.

21 First of all, this case wasn't brought as an
22 arbitration, so obviously I don't believe Mr. Weisberg thought
23 of it as a nominal amount of money.

24 Besides that, being realistic, I don't think this
25 case is that complicated that it's going to take more than

1 three hours to try the case in front of an arbitration, and I
2 don't think an arbitration panel is going to have tons of
3 records to copy. In fact, from what I can see, the only thing
4 they're going to copy is their decision.

5 We've already discussed about whether it's arising
6 from the contract, so I won't get into that.

7 As far as the federal claims are concerned, there's
8 no reason at all why an arbitration panel can't hear the
9 federal claims, the state claims, all claims at one time.
10 Everyone who's licensed to practice law in Pennsylvania is
11 also licensed to practice law in Federal Court in
12 Pennsylvania, unless they didn't fill out the paperwork.

13 I don't believe it's a contract of adhesion. No one
14 forced him to sign anything.

15 And the contract being nullified, in paragraph 1 of
16 the arbitration agreement, the last line, it says, "The
17 arbitration provisions contained herein shall survive the
18 termination or expiration of this contract."

19 Now, going to the argument that it all has to be one
20 document, I think that that's where the definition comes in,
21 whether one document is just one page, or one document is all
22 the documents that make up the whole contract. I believe that
23 it's all the documents that make up the whole contract.

24 For example, when you sell a car, you have to have
25 an odometer statement in there to say what the odometer reads.

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1 Is that not part of the contract because it's on a separate
2 paper? I don't think anybody would argue that.

3 There is no retail installment sales contract in the
4 documents that I gave you. I don't know if it's because one
5 doesn't exist or because they haven't found it. I just know
6 it's not there, and I'm looking into that to get more
7 information. But there is no retail installment sales
8 contract in the documents that would show the lender, because
9 that's where the lender goes. There are applications to show
10 that it's going to other people, but there's nothing in the
11 documents that I gave you that show that Desimone is in any
12 way, shape or form the lender in this case.

13 And I think that's it. Thank you.

14 THE COURT: Okay. Anything further, Mr. Weisberg?

15 MR. WEISBERG: Yes, just very quickly.

16 As to the specificity of the fraud allegation.
17 Defense read part B, which I'm happy to say to the Court I
18 will withdraw, which we're going with the second aspect of our
19 case.

20 THE COURT: Okay.

21 MR. WEISBERG: But the first part A said that the
22 defendants had not secured financing when they had.

23 And in terms of the he saids, she saids, I think
24 it's not the law that in Federal Court you're supposed to take
25 a paragraph and pull it out and that's the only thing you look

1 at. I think the law is that you have to look at the entire
2 complaint. And the paragraphs are by law incorporated by
3 reference.

4 The he says, she says, all throughout, we have
5 quotes in here, we have people in here, we have dates, we have
6 times. I understand the Court's concern regarding the
7 provision of a federal statute and should a defense have to
8 find the provision. I understand that concern.

9 I don't understand the defense's concern that it
10 hasn't been -- that anything else hasn't been pleaded with
11 specificity because it has.

12 And in any event, our motion contends that argument
13 waived. Rules 8 and 9 are not cited at all in the entire
14 brief. Not much case law was cited at all in the entire
15 brief. And if the case is so simple, which it may be, I don't
16 see why the complaint itself is not enough notice for the
17 defense to respond, except in the Court saying that ECOA
18 should have been better specified. I think the facts are in
19 the complaint and specific enough.

20 In terms of the -- and my last point is, in terms of
21 the Motor Vehicle Financing Sales Act, it's the financing
22 documents that must be all one. I didn't say that there could
23 be a separate odometer disclosure. It's the finance
24 documents. That's why this conditional financing addendum is
25 not -- has been held not binding.

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1 THE COURT: Okay.

2 MR. WEISBERG: All right, thank you, Judge.

3 THE COURT: Thank you very much.

4 Thank you both very much. I will take it under
5 advisement. We're hereby adjourned.

6 THE CLERK: All rise.

7 (Matter concluded at 10:02 a.m.)

8 * * * *

C E R T I F I C A T I O N

I, Sandra Carbonaro, court approved transcriber,
certify that the foregoing is a correct transcript from the
official electronic sound recording of the proceedings in the
above-entitled matter.

SANDRA CARBONARO

Doman Transcribing & Recording Svcs. _____

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